IN THE COURT OF APPEALS OF IOWA

No. 0-949 / 10-0454
Filed March 7, 2011

IN RE THE MARRIAGE OF
DOUGLAS J. BARGER AND
CAROL K. JOCHIMS-BARGER

Upon the Petition of
DOUGLAS J. BARGER,
Petitioner-Appellee,

And Concerning
CAROL K. JOCHIMS-BARGER,
Respondent-Appellant.

Appeal from the Iowa District Court for Boone County, Michael J. Moon, Judge.

Douglas Barger appeals from the district court's order modifying his child support obligation and denying his request to modify physical care. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Meredith C. Nerem of Jordan & Mahoney Law Firm, P.C., Boone, for appellant.

Carol K. Jochims-Barger, Perry, appellee pro se.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Danilson, J., takes no part.

VOGEL, J.

Douglas Barger appeals from the district court's order modifying his child support obligation and denying his request to modify the child custody provisions of his and Carol Jochim-Barger's dissolution decree. As we agree with the district court that Douglas failed to show a substantial change of circumstances regarding custody, we affirm joint physical care. However, we disagree that there was a substantial change of circumstances that would warrant an increase in child support. Therefore, we reverse and remand for re-entry of the August 26, 2009 child support order.

I. Background Facts and Proceedings

Douglas and Carol's marriage was dissolved in October 2008. They have two children, born in 1997 and 1999. Pursuant to the dissolution decree, the parties were granted joint legal custody and joint physical care of the children. The court determined Douglas's child support obligation was $452.05 per month,[1] with the stipulation that prior to December 31, 2008, Carol was to provide proof that she applied for social security disability benefits, along with the status of the application, or evidence that she had either qualified for or was denied benefits.

> If [Carol] has been denied disability benefits, then for child support purposes, her income shall be imputed as the amount reported on her 2004 tax returns and child support shall be recalculated. The parties shall cooperate in the recalculation of child support. If the parties are unable to cooperate the Court shall retain jurisdiction to

[1] This amount was arrived at using Douglas's net monthly income of $2385.45, with $768.11 as the child support obligation, were Carol the physical care parent, and Carol's net monthly income of $1053.54, with $316.06 as the child support obligation, were Douglas the physical care parent.

> enter a determination on the Motion of either party to modify child support.

On February 17, 2009, Douglas filed an application for hearing concerning Carol's non-compliance with providing the social security information required in the decree. Following a hearing, on March 9, the district court, sensing Carol had been intentionally delaying the process, allowed her until June 21 to provide proof of a fully completed application and determination. If she failed to comply, the court ordered "child support shall be recalculated pursuant to the Decree based upon her income as reported on her 2004 tax returns." On July 14, the district court found that Carol "has no proof of the application being submitted other than her own testimony," and accordingly ordered child support be recomputed based upon her income shown on her 2004 tax returns.

On July 22, Carol filed a motion to reconsider, along with submission of her social security disability application. On July 31, Douglas filed an application seeking physical care of the children and modifying child support accordingly. On August 10, Carol's motion to reconsider was denied, as the court stated it was "not inclined to reopen the evidence to consider the attachments to the Motion to Reconsider," as "[Carol] had ample opportunity to obtain the documentation attached to the Motion to Reconsider and submit it for the hearing on July 13, 2009." On August 26, Douglas and Carol submitted new child support guideline worksheets; the court recomputed the support obligation and reduced Douglas's payment to $65.20 per month. On February 26, 2010, following a hearing for modification of physical care, the court dismissed Douglas's application to modify the custodial provisions, but increased Douglas's

child support obligation to $311.69 per month. Douglas appeals both the denial of physical care of the children and the increase in the child support amount.[2]

II. Standard of Review

We review modification proceedings de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). A party who seeks a modification of child custody or support must establish by a preponderance of the evidence that there has been a material and substantial change in circumstances since the entry of the decree, or since the last order modifying the decree. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998) (modifying child support); *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992) (noting a change of circumstances is measured from the last order entered); *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (modifying child custody).

III. Physical Care of the Children

Douglas asserts the district court should have modified the joint physical care provision of the dissolution decree to grant him physical care of the children. Based on Carol's mental health problems, careless supervision of one of the children's special needs, and failure to provide a safe and stable environment for the children, Douglas asserts he proved a material and substantial change in circumstances, and that he is the superior parent. It is clear that Douglas's primary concern is for the safety of the children balanced against Carol's mental health struggles and depression, and the emotional impact these difficulties may

[2] The October 2008, March 9, July 14, August 10, and August 26, 2009 orders were entered by Judge David R. Danilson, prior to his appointment to the Iowa Court of Appeals. The February 26, 2010, order was entered after a hearing before Judge Michael J. Moon.

have on the children. While Douglas's concerns are very valid, there is sufficient evidence that these issues were present at the time of the original dissolution decree. *See Frederici*, 338 N.W.2d at 158 (explaining that the changed circumstances must not have been contemplated by the court when the decree was entered).

The district court addressed Douglas's concerns, recognizing Carol's weaknesses, but noted that she had been getting treatment for her mental health issues, and had a large support system to help her. Ultimately the court did not find a substantial change in circumstances had occurred that was not apparent at the entry of the decree. The court noted, "the parties are able to communicate with one another concerning the children and neither complained of difficulty with the logistics of shared physical care. . . . The children appear to be faring well in their present circumstances," and thus dismissed the application to modify custodial provisions. We agree that as to joint physical care of the children, there has been no substantial change in circumstances since the time of the original dissolution decree and affirm the district court's denial of Douglas's application for physical care.

IV. Child Support

Douglas next contends the court erred in modifying his child support obligation. Citing a substantial change in circumstances *since the entry of the decree*, the district court modified Douglas's child support obligation from $65.20 as ordered on August 26, to $311.69, stating "[n]either [income] figure is realistic based upon the current circumstances of the parties." In Douglas's July 31, 2009 application to modify physical care, he made no request to modify child support,

unless he be granted physical care. Moreover, Carol did not appeal the August 26 order, nor did she request a change in child support in response to Douglas's application to modify physical care. Therefore, the August 26 order, not the original decree, is the appropriate child support order from which Carol must prove a substantial change of circumstances to modify the support amount. *See Lee*, 486 N.W.2d at 304 (explaining with regard to child support orders, "A party asking for modification of a dissolution decree must establish by a preponderance of the evidence that there has been a substantial change in the circumstances since the entry of the decree *or its latest modification of the provisions involved*") (emphasis added).

Upon review of the record, we find that from the August 26, 2009 order, until the time of the modification hearing in February 2010, no substantial change in circumstances occurred that would warrant a change in Douglas's child support obligation. *See* Iowa Code § 598.21C(1) (2009); *Walters*, 575 N.W.2d at 741 (stating that a court may modify an order of child support when a "substantial change in circumstances" has been shown to exist, including a change in employment, earning capacity, income, or resources of a party). Prior to the entry of the August 26 order, the district court provided Carol with repeated opportunities to comply with the mandates of the October 3, 2008 dissolution decree before recalculating the child support amount. Since that order, Carol provided no evidence that her circumstances had changed such that a modification of child support was warranted. Therefore, we reverse and remand for the district court to reinstate the August 26, 2009 child support order.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.